California Unlawful Detainer Procedure--A Proposed Legislative Change

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CALIFORNIA UNLAWFUL DETAINER PROCEDURE—A PROPOSED LEGISLATIVE CHANGE

California's unlawful detainer procedure is enmeshed in a common legal predicament—how to satisfy the natural desires of two traditionally hostile interest groups facing one another in a highly charged atmosphere. The purpose of this Note is to describe the present dilemma from the point of view of both landlord and tenant, taking into consideration recent amendments and attempted revisions of existing statutes. After noting the inadequacies of the present unlawful detainer system in California, the author concludes by suggesting, in general terms, a legislative remedy.

The author does not attempt to summarize or review all, or even most, of California's unlawful detainer law; this has been done thoroughly and accurately elsewhere. This Note proceeds on the assumptions that the reader has a general understanding of unlawful detainer law, and that the parties in any of the examples used herein have complied with all preliminary and technical procedural rules, unless otherwise noted.

I. Inadequacies of California's Unlawful Detainer Procedure as Seen by the Landlord

There are two major areas of landlord dissatisfaction: (1) The costs involved in ousting an undesirable tenant, and (2) the measure of damages allowed upon obtaining judgment in unlawful detainer.

A. Costs

The costs involved in removing an undesirable tenant are often so prohibitive that one landlord representative advises his clients to give their undesirable tenants a free month's rent and/or relocation assistance if the tenant will vacate without the necessity of legal process.


3. It should also be noted that this article deals primarily with residential short-term leases (one year or less) although in most instances the reasoning can be applied to a commercial situation.

One practice text suggests avoiding an unlawful detainer action if at all possible because of the high costs. The breakdown of these costs follows.

1. **Attorney’s Fee**

   The minimum fees required by an attorney to take all steps necessary to oust the tenant range from $200 to $500 in metropolitan areas. This figure will increase if an appeal is taken or if complications arise. In the absence of an express lease provision, attorney’s fees are not recoverable from a defaulting tenant.

2. **Judicial Costs**

   Ancillary to litigation, but apart from attorney’s fees, are judicial costs. Examples are filing costs, service costs, and jury costs. Unlike attorney’s fees, these costs are recoverable from the defendant-tenant in an unlawful detainer action. Note, however, that if despite all the above mentioned preliminary expenditures, the tenant is still in possession, the additional and very considerable cost of a sheriff’s eviction must be sustained.

3. **Eviction Costs**

   For service of the writ of possession, the landlord must pay $10 plus 70 cents per mile, one-way. If the service of the writ of possession and

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5. CEB—Real Estate, *supra* note 2, at 540-41. In considering this landlord complaint, it should be kept in mind that many landlords are small operators and probably not “rich.” Statement by Jeremy Ets-Hokin, *Interim Hearings on Housing Before the Committee on Governmental Efficiency and Economy* 83 (San Francisco Dec. 12, 1968).

6. The writer assumes here that litigation is necessary because the tenant is guilty of unlawful detainer, *Cal. Code Civ. Proc.* §§ 1161(1)-(4), and refuses to comply or quit.


9. *Cal. Code Civ. Proc.* § 1021. Of course, most leases or rental agreements contain such a provision; however, if the tenant is insolvent, such an agreement is of little practical significance to a landlord. See note 24 & accompanying text *infra*.


11. *Id.* at 93.


14. *Cal. Gov’t Code* §§ 26733, 26746. Mileage is measured from the sheriff’s
notice to vacate is unsuccessful in regaining possession, forcible eviction by the sheriff becomes necessary.

Before they will act, enforcement officers require a substantial deposit to cover their costs. In populous counties, representative amounts for this deposit are: $75 per room, or flat fees of $200 or $250. Less populous counties, where the remedy is less often used, and/or less expensive enforcement techniques are employed, may charge considerably less. Nonetheless, in all likelihood, a landlord will have to expend at least $400 for attorney’s fees and eviction costs office to the place of service. See CALIFORNIA STATE SHERIFFS’ ASS’N, CIVIL PROCEDURE MANUAL § 4.21, at 84-85 (1969).

15. See note 30 & accompanying text infra.

16. The authority to charge for services is found in CAL. GOV’T CODE § 6100. Payment in advance is authorized by CAL. GOV’T CODE § 24350.5. Actual fee amounts, as determined by specific sections of the Government Code, are authorized by CAL. GOV’T CODE §§ 26720 (sheriff), 27821 (constable), 71266 (marshall). The specific section authorizing a fee for moving costs is CAL. GOV’T CODE § 26748. See also CALIFORNIA STATE SHERIFFS’ ASS’N, CIVIL PROCEDURE MANUAL §§ 4.6-8, at 74-75 (1969).

17. Telephone Interview with Sgt. White, Sheriff’s Department of Alameda County, Sept. 19, 1969 [hereinafter cited as Alameda Sheriff Interview]. Alameda population was 1,127 thousand by October 1968. FEDERAL HOUSING ADMINISTRATION, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ANALYSIS OF THE SAN FRANCISCO—OAKLAND CALIFORNIA HOUSING MARKET App., Table IV (Mar. 1969) [hereinafter cited as HOUSING MARKET].

18. Telephone Interview with Capt. Blasser, Sheriff’s Department of San Mateo County, Sept. 19, 1969 [hereinafter cited as San Mateo Sheriff Interview]. The population of San Mateo County was 590 thousand by October 1968. HOUSING MARKET, supra note 17, at App., Table IV.

19. Interview with Chief Deputy Sheriff Carl M. Olsen, Sheriff’s Department of San Francisco City and County, Aug. 12, 1969 [hereinafter cited as San Francisco Sheriff Interview]. San Francisco City and County population was 762 thousand by October 1968. HOUSING MARKET, supra note 17, at App., Table IV.

20. Marin County charges a $65 flat fee. Telephone Interview with Mrs. Machato, Sheriff’s Department of Marin County, Sept. 19, 1969 [hereinafter cited as Marin Sheriff Interview]. Marin County population was 214 thousand by October 1968. HOUSING MARKET, supra note 17, at App., Table IV. For techniques used see notes 43 & 183 infra; the frequency of use in fiscal 1969 was as follows:

<table>
<thead>
<tr>
<th>County</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>San Francisco</td>
<td>667*</td>
</tr>
<tr>
<td>Alameda</td>
<td>600 (approx.)</td>
</tr>
<tr>
<td>San Mateo</td>
<td>320 (approx.)</td>
</tr>
<tr>
<td>Marin</td>
<td>120 (approx.)</td>
</tr>
</tbody>
</table>

These figures are based on a report from San Francisco and interviews with Sheriff’s representatives in the counties affected. See notes 17-20 supra.

*This figure includes 161 from San Francisco Housing Authority, which recently lifted its moratorium on evictions. This somewhat distorts San Francisco figures upwards since the Housing Authority is now in a catching up phase. Telephone Interview with John Sullivan, General Counsel to the San Francisco Housing Authority, Sept. 23, 1969 [hereinafter cited as Sullivan Interview].
in addition to the sum required for judicial costs and costs for service of the writ of possession.\textsuperscript{21}

With the exception of the attorney’s fee,\textsuperscript{22} the above costs are recoverable in the unlawful detainer judgment against the tenant.\textsuperscript{23} Nevertheless, as a practical matter, it seems unlikely that a tenant who has let matters progress to this stage will be able to pay.\textsuperscript{24}

It is not surprising that in 1967 landlords attempted by legislation to shift the burden of these recoverable costs to the county in which the writ of possession was awarded. Assembly Bill 1648, amending California Code of Civil Procedure section 1174, was enacted and by its terms placed the expense of service and eviction upon the enforcing county.\textsuperscript{25} The statute, however, was not widely enforced\textsuperscript{26} and within a year was declared unconstitutional as an unlawful expenditure of public money for private benefit.\textsuperscript{27}

Repeal of this amendment to section 1174 came in 1968 with the adoption of Assembly Bill 387. This legislation, however, did not restore the status quo ante,\textsuperscript{28} rather, it added new dimensions to the cost situation involved in unlawful detainer procedure.

\textsuperscript{21} Undoubtedly the figure is higher since few attorneys are likely to charge the minimum figure. Consider also that the aforementioned sheriff’s deposits only apply to residential evictions. Commercial evictions can be frighteningly expensive. One recent eviction inventory of a San Francisco parts warehouse cost $1500—moving the goods out would have involved an additional expense. San Francisco Sheriff Interview, \textit{supra} note 19.

\textsuperscript{22} See note 9 & accompanying text \textit{supra}.

\textsuperscript{23} \textsc{Cal. Code Civ. Proc.} §§ 1034.5, 1174.

\textsuperscript{24} \textsc{CEB—Real Estate, supra} note 2, at 541.

\textsuperscript{25} Cal. Stats. 1967, ch. 1600, § 2, at 3830 (effective Nov. 8, 1967): “[The landlord] shall be entitled to have the premises restored to him by officers charged with enforcement of such writs without payment of any fees in connection herewith.

All goods, chattels or personal property of the tenant remaining on the premises at the time of its restoration to the plaintiff, shall be stored by the county . . . .” \textit{Id.} § 2, at 3831 (emphasis added).

This legislation received strong support from major landlord organizations. Interview with Robert Gnaizda, staff member of California Rural Legal Assistance Foundation, in San Francisco, Sept. 4, 1969; San Francisco Sheriff Interview, \textit{supra} note 19.

\textsuperscript{26} San Francisco Sheriff Interview, \textit{supra} note 19; \textsc{II Continuing Education of the Bar, Legal Services Gazette} 71 (Aug.—Sept. 1968) [hereinafter cited 95 \textsc{CEB—Gazette}]. One county that did enforce the amendment found it rather expensive—$15,000 for less than one year. San Mateo Sheriff Interview, \textit{supra} note 18.

\textsuperscript{27} Phillips v. Davenport, Civ. No. 64125 (Monterey Super. Ct., Dec. 1, 1967), in \textsc{CEB—Gazette, supra} note 26, at 70; Lopez v. Kelsay, No. 97628 (Stanislaus Super. Ct., Apr. 22, 1968), in \textsc{CEB—Gazette, supra} note 26, at 243. The statutory basis for the decisions is \textsc{Cal. Const.} art. 13, § 25.

\textsuperscript{28} \textit{Compare} \textsc{Cal. Stats.} 1945, ch. 593, § 1, at 1126, \textit{with} \textsc{Cal. Stats.} 1968, ch. 102, § 2, at 314.
Perhaps the most effective of the amendment's additions to California's unlawful detainer procedure (section 1174) is the five day period which the enforcing officer must give to the tenant between the time the writ of possession is served and the time when the writ of possession can be enforced by eviction. In conjunction with this five day period, sheriffs often use a notice to vacate that is printed in headline size type and unmistakably informs the tenant he must vacate within the period or be evicted by the sheriff. The net effect of the notice and the five day period has been to encourage more tenants to vacate voluntarily.

The 1968 amendment to section 1174 also permits the landlord to store his evicted tenant's belongings "on the premises" rather than move them out as previously required. This, of course, relieves the landlord from shouldering the burden of the moving deposit. The term "on the premises," however, seems to require using the rental unit itself for the storage. This is a reasonable interpretation since the storage cost allowed to the landlord in his supplemental cost bill is based on the reasonable value of the premises. Note, nonetheless, that while the landlord avoids the moving deposit, he ties up his property for 30 days—the period of storage required under the amended statute. Thus, the victory is a Pyrrhic one if the lost rent for this period is not recoverable and equals or exceeds the avoided moving cost.

In addition to the above changes another cost item was added to California's unlawful detainer procedure. An inventory of all the

29. CAL. CODE CIV. PROC. § 1174.
30. This form apparently originated with Capt. Blasser of the San Mateo County Sheriff's Office. San Francisco Sheriff Interview, supra note 19; San Mateo Sheriff Interview, supra note 18. There is no formal requirement that notice be given in this manner. Under previous law, no stay was provided for except in special cases; thus, no preliminary notice had to precede service or enforcement of the writ. See Cal. Stats. 1945, ch. 593, § 1, at 1126.
31. Alameda Sheriff Interview, supra note 17; Brown Interview, supra note 4; San Francisco Sheriff Interview, supra note 19; San Mateo Sheriff Interview, supra note 18.
32. See notes 16-19 & accompanying text supra.
33. See CAL. CODE CIV. PROC. §§ 1034.5, 1174; see text accompanying note 24 supra.
34. CAL. CODE CIV. PROC. § 1174. This assumes that the tenant does not move his belongings out during the five day period.
36. See CAL. CODE CIV. PROC. § 1034.5.
37. CAL. CODE CIV. PROC. § 1174.
38. Id.
39. See text accompanying note 24 supra.
40. Cal. Stats. 1968, ch. 102, § 2, at 314.
tenant's belongings remaining on the premises is now required, regardless of whether they are stored on the premises or moved to a public warehouse. Such an inventory must either be made or verified by the sheriff. Depending on the technique used, this additional expense can be considerable.

Finally, in connection with the storage and inventory provisions, the amended version of section 1174, added a presumption that the tenant has abandoned his belongings after they have been stored and unclaimed for the required 30 days. This same addition provides for the disposal of the goods at a public sale with the proceeds going first to pay the judgment, judicial costs, eviction costs, and costs of sale; the balance, if any, going to the tenant.

The 1968 amendment to section 1174 did not, however, define "public sale" and thus some doubt existed about what was meant. To clarify this point, the 1969 California Legislature again amended section 1174 by adding the following definitive language:

[At a public sale] by competitive bidding, to be held at the place where the property is stored, after notice of the time and place of such sale has been given at least five days before the date of such sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Notice of the public sale may not be given more than five days prior to the expiration of the 30 days during which the property is held in storage.

There is one additional problem relative to public sale of the tenant's belonging which should be mentioned. If the tenant's belongings are relatively valueless and, when sold, do not cover the costs of sale, the landlord suffers this additional expense. On the other hand, if the

41. CAL. CODE CIV. PROC. § 1174. There was no former requirement of an inventory.
42. Id.
43. San Francisco Sheriff Interview, supra note 19 (highly detailed inventory); Marin Sheriff Interview, supra note 20 (minimum detail).
44. The charge in San Francisco is $20 per hour per man. San Francisco Sheriff Interview, supra note 19.
45. The tenant may reclaim his belongings only after he has paid the judgment and all costs. CAL. CODE CIV. PROC. § 1174.
46. CAL. CODE CIV. PROC. § 1174. In the case notes 100, 102 infra, the tenant argued that this presumption was unconstitutional because it was not based on incontrovertible facts and thus denied him due process in the taking of his property. In support, the tenant's memorandum cited Heiner v. Donna, 285 U.S. 312 (1932); Schlessinger v. Wisconsin, 270 U.S. 236 (1926).
47. CAL. CODE CIV. PROC. § 1174.
48. San Francisco Sheriff Interview, supra note 19. It could be argued that the terminology did not mean a sheriff's sale since the sheriff did not take possession of the tenant's belongings.
landlord disposes of the goods outside the terms of the statute, i.e., other than by public sale, he may be liable in a conversion action brought by the tenant.\(^{50}\)

Thus, if one balances these relevant factors, Assembly Bill 387,\(^{51}\) amending section 1174 of the Code of Civil Procedure, reduces the landlord's eviction costs only to the extent the tenant voluntarily vacates under the new five day notice.\(^{52}\) However, where the tenant is obstinate and refuses to vacate voluntarily, it puts an additional cost burden on the landlord.\(^{53}\)

**B. Damages Obtainable upon Judgment**

Under California's present unlawful detainer procedure, landlords cannot recover, as damages, the loss of future rent. In other words, the landlord who prevails in the unlawful detainer trial is awarded possession, and only incidentally, rent and damages accrued to the time of trial.\(^{64}\) He cannot recover any sum based on lost future rents as a result of the breach that occasioned the unlawful detainer action.\(^{55}\) If the lease is forfeited in the action, the tenant's obligation to pay rent ceases and no further recovery by the landlord is possible.\(^{56}\) Suppose, however, that the landlord wants to evict the tenant and still hold him responsible for any future rent loss that the landlord may sustain. Is this possible?

While there is no case authority in point, persuasive arguments can be found in a study and recommendation made by the California Law Revision Commission.\(^{57}\) There, the conclusion is reached that the only

\(^{50}\) See generally Comment, The Unclaimed Personal Property Problem: A Legislative Proposal, 19 STAN. L. REV. 619 (1967). Unfortunately, there appears to be no solution to this problem that will satisfy both competing interests. The law as amended is probably as satisfactory as any other possible solution. Fortunately, the problem is not a large one.

\(^{51}\) Enacted in Cal. Stats. 1968, ch. 102, § 2, at 314.

\(^{52}\) See notes 29-33 & accompanying text supra.

\(^{53}\) See notes 40-50 & accompanying text supra.

\(^{54}\) Markham v. Fralick, 2 Cal. 2d 221, 227, 39 P.2d 804, 807 (1934); Fontana Ind. v. Western Grain Co., 167 Cal. App. 2d 408, 411, 334 P.2d 611, 613 (1959); Garfinkle v. Montgomery, 113 Cal. App. 2d 149, 153, 248 P.2d 52, 54 (1952). Damages include all those reasonably flowing from the unlawful detention up to the time of judgment. See cases cited supra; Roberts v. Redlich, 111 Cal. App. 2d 566, 569, 244 P.2d 933, 935 (1952).


\(^{57}\) Harvey, A Study to Determine Whether the Rights and Duties Attendant upon the Termination of a Lease Should Be Revised, 54 CALIF. L. REV. 1141 (1966) [hereinafter cited as Harvey]; CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION RELATING TO REAL PROPERTY LEASES 401 (Oct. 1968) [hereinafter cited as LAW
way, under present law, that the landlord can recover future rent is by
the unsure procedure of continuing the lease in force after receiving the
unlawful detainer judgment and suing for the accrued rent at the end
of the original lease term. This remedy, however, is unsatisfactory on
several counts. First, if the lease is for a very long period, suing at the
end of the term may be fruitless, especially if the tenant dies, leaves the
jurisdiction, or becomes insolvent. Second, the landlord must be very
careful to notify the tenant that he is reletting for the tenant's account;
such a reletting may otherwise work a surrender by operation of law.
Third, if the landlord chooses to leave the premises vacant and to sue
the tenant after expiration of the leasehold, the issues of mitigation of
damages and forfeiture can be raised by the tenant. Should the
landlord choose the last alternative, he must act in a manner consistent
with the tenant's continued right to possession or risk a surrender by
operation of law.

In passing, it should be noted that the landlord can have his dam-
age award tripled if the tenant's unlawful detainer is shown to be wilful
—not a good faith holding by the tenant. Such an award, however, is
discretionary with the trial court, and because of its penal nature, the
statute providing for it is strictly construed. Thus, recovery of triple
damages is only a possibility and will not normally compensate the
landlord for his inability to collect future rent.

II. Inadequacies of California's Unlawful Detainer Procedure
as Seen by the Tenant

Tenant dissatisfaction with California's unlawful detainer proce-
dure is based primarily on the federal and state constitutional consider-

Revision Comm'n Recommendation]. The cases cited in the above sources, and the
cases cited in notes 59 & 61 infra, relate to the situation occurring after an abandon-
ment—not after an eviction or judgment in unlawful detainer.

58. Harvey 1169; Law Revision Comm'n Recommendation 408-09. This as-
sumes that there is no specific lease provision. See Cal. Civ. Code § 3308; Harvey
1174-77.

59. Law Revision Comm'n Recommendation 408. See, e.g., Yates v. Reid, 36
Cal. 2d 383, 385, 224 P.2d 8, 9 (1950); Welcome v. Hess, 90 Cal. 507, 513-14, 27 P.
369, 370 (1891); Dorcich v. Time Oil Co., 103 Cal. App. 2d 677, 683-88, 230 P.2d 10,
13-17 (1951). But see De Hart v. Allen, 26 Cal. 2d 829, 832, 161 P.2d 453, 455
(1945).

60. See Law Revision Comm'n Recommendation 409-12; Harvey 1170.

61. Law Revision Comm'n Recommendation 408; see cases cited note 59
(1952).

62. E.g., Whipple v. Haberle, 223 Cal. App. 2d 477, 485, 36 Cal. Rptr. 9, 14-15
(1963); Gwinn v. Goldman, 57 Cal. App. 2d 393, 399-401, 134 P.2d 915, 917-19
(1943); see Cal. Code Civ. Proc. § 1174.

63. See cases cited note 62 supra.

ations of due process and equal protection.\textsuperscript{65} Other tenant objections are based on the costs and the mechanics of the unlawful detainer procedure.

\section*{A. Affirmative Defenses and Counterclaims Usually Not Allowed}

This challenge stems from the summary nature\textsuperscript{66} of the unlawful detainer remedy. To preserve the summary nature of the proceeding, possession is made the sole issue;\textsuperscript{67} counterclaims and affirmative defenses are almost always excluded.\textsuperscript{68} This exclusion results in a basic inequality between the landlord-plaintiff and the tenant-defendant. The best compendium of arguments illustrating this inequality is found in a recent petition urging the convening of a three judge federal court to review California's unlawful detainer procedure.\textsuperscript{69}

The case arose when a landlord sought to evict four of his tenants for nonpayment of rent. During the unlawful detainer proceeding, evidence on several affirmative defenses\textsuperscript{70} was refused as being inadmissible in such an action. The landlord was given judgment for possession; a stay of execution on the writ of possession was refused, despite the offer of a bond sufficient in amount to cover the judgment, costs and rents that would accrue pending the appeal. In response, the Alameda County Legal Aid Society, representing the tenants,\textsuperscript{71} filed a

\textsuperscript{65} U.S. Const. amend. XIV, § 1; Cal. Const. art. 1, § 13. The California Constitution article 1, section 13 is by its terms applicable only to criminal proceedings. It has been held, however, to be identical in scope and purpose with the fourteenth amendment of the United States Constitution. Manford v. Singh, 40 Cal. App. 700, 701, 181 P. 844 (1919).


\textsuperscript{68} See cases cited note 66 supra. For exceptions see notes 91-92 infra.

\textsuperscript{69} Petitioner's Brief in Support of Convening a Three Judge Court, Hutcherson v. Lehtin, Civ. No. 52196 (N.D. Cal., filed Sept. 9, 1969) [hereinafter cited as Petitioner's Brief]. For disposition of the case, see note 185 infra.

\textsuperscript{70} The affirmative defenses were centered around the argument that no rent (or at least diminished rent) was due because the building was seriously dilapidated. These defenses were framed in the following terms: The lease was entered into for an illegal purpose (code violations were preexisting); failure of consideration; constructive eviction; unclean hands; retaliatory eviction (possible free speech issue); and racial discrimination because the level of services had declined when the building became predominantly occupied by black persons. Petitioner's Brief at 3.

\textsuperscript{71} There were originally four tenants who lost in the unlawful detainer trial and who subsequently joined in this action, which was brought as a class action on behalf of all tenants of substandard housing. Despite the temporary restraining order preventing their eviction until a decision was rendered, two of the original four tenants vacated the premises during the pendency of this action.
petition for convening a three judge court and requested that a temporary restraining order be directed to the Sheriff of Alameda County to prevent enforcement of the writ of possession. The temporary restraining order was issued, and on October 3, 1969, a three judge federal court\textsuperscript{72} convened to hear arguments on the points raised by the tenants' counsel.

Counsel for the tenants argued that decisions of the United States Supreme Court require equal treatment of plaintiff and defendant,\textsuperscript{73} and that procedural technicalities can produce inequalities.\textsuperscript{74} In their petition, counsel for the tenants described the procedural technicalities that place the tenant on unequal footing with the landlord in an unlawful detainer action:

1. If the landlord brought a common law action for rent or ejectment, the tenants' defenses or counterclaims could be raised.\textsuperscript{75} To deny a tenant this right in an unlawful detainer proceeding forces him to bring a separate suit to assert these claims. This places a difficult and irreparable burden on the tenant, particularly if he is raising the defense that the premises are uninhabitable,\textsuperscript{76} and/or if he is poor, which is normally the case with persons living in substandard housing.\textsuperscript{77}

2. In the tenant's separate suit the landlord can raise any defenses or counterclaims available to him;\textsuperscript{78} the tenant is not afforded the same privilege when the landlord is suing him in unlawful detainer.

3. In the tenant's separate damage action, the landlord can stay execution on appeal (if the tenant wins) as a matter of right by posting a sufficient bond;\textsuperscript{79} when the landlord wins an unlawful detainer suit, a stay on appeal for the tenant is only discretionary despite the posting of an adequate bond.\textsuperscript{80}

4. In an unlawful detainer action the landlord has the possibility

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\textsuperscript{72} The three judge federal court consisted of United States District Judges William T. Sweigert and Gerald S. Levin, and United States Circuit Judge Ben C. Duniway (all from the Ninth Judicial Circuit).

\textsuperscript{73} Petitioner's Brief at 8, \textit{citing} Gulf v. Ellis, 165 U.S. 150 (1897).

\textsuperscript{74} \textit{Id.} at 9, \textit{citing} Griffin v. United States, 351 U.S. 12 (1956).


\textsuperscript{76} Based on \textit{Cal. Civ. Code} §§ 1941, 1942.


\textsuperscript{78} \textit{Cal. Code Civ. Proc.} § 438; Petitioner's Brief at 6, 7, 14.

\textsuperscript{79} \textit{Cal. Code Civ. Proc.} § 942; Petitioner's Brief at 4.

\textsuperscript{80} \textit{Cal. Code Civ. Proc.} § 1176; Petitioner's Brief at 10.
of receiving triple damages;\textsuperscript{81} no similar opportunity is provided for the tenant in his separate damage suit.

5. The landlord's unlawful detainer suit is given a preference on the court's calendar,\textsuperscript{82} the tenant's damage action is scheduled on the normal supply and demand basis. This, in effect, makes unlawful detainer summary for the landlord but not for the tenant. As a consequence, the unlawful detainer procedure gives an unconstitutional preference to landlords because there is nothing inherent in the landlord's claims that requires swifter handling.

In addition to the equal protection argument, the petition raised a due process argument;\textsuperscript{83} that is to say, no fair determination of tenants' substantive rights\textsuperscript{84} can be made in the unlawful detainer proceeding since these rights are precluded from being asserted therein. Because the unlawful detainer procedure is summary and a stay of execution is discretionary, the tenant may lose his valuable interest (the tenancy) before receiving a full hearing. This violates a recently announced principle that the scope of the hearing must be consistent with the burden to be imposed.\textsuperscript{85} In other words, if a person is to be ejected from his living quarters, he is entitled to a more extensive hearing than the person protesting a parking ticket, wherein the resulting loss will be a minimum fine as compared with loss of habitation.

Although the arguments are sound and well-supported, there are some serious deficiencies with this particular suit that may prevent its success in the federal court. For example, there is no specific statutory prohibition of affirmative defenses or counterclaims; the only applicable statute simply says that the tenant may either appear and answer or demur.\textsuperscript{86} The prohibitions are found in case law and form only a discouraging pattern,\textsuperscript{87} rather than an absolute prohibition. While there are no cases that specifically deny the tenant defenses discussed above,\textsuperscript{88} their exclusion seems likely if the old pattern continues.\textsuperscript{89}

\begin{itemize}
\item 81. Cal. Code Civ. Proc. § 1174; see notes 62-64 & accompanying text supra.
\item 82. Cal. Code Civ. Proc. § 1179a; Petitioner's Brief at 9.
\item 83. Based on U.S. Const. amend. XIV, § 1.
\item 84. For instance, counterclaims.
\item 87. \textit{See} cases cited note 66 supra.
\item 88. \textit{See} note 70 supra.
\item 89. \textit{See} cases cited note 66 supra.
\end{itemize}
In addition, without a definitive pronouncement from the California Supreme Court, the federal court may say that the case is premature, particularly in view of an exception to the no-defense rule made for equitable defenses. This exception is not particularly helpful to indigent tenants, however, since it requires the expense of a separate injunctive action and is limited to equitable defenses.

The federal court can also point to the California code section allowing relief from forfeiture for hardship after an unlawful detainer judgment and suggest that this remedy should have been invoked. Any remedy here is illusory, however, since relief will only be granted after judgment, when the tenant has paid all rent due, or fully performed all conditions or covenants, so far as practicable.

B. Lack of an Exemption Provision in California Code of Civil Procedure Section 1174

California Code of Civil Procedure section 1174 provides for the seizure and storage of tenants' goods remaining on the premises following an unlawful detainer judgment. This was a statement from the bench by Circuit Judge Ben C. Duniway during oral argument of Hutcherson v. Lehtin, Civ. No. 52196 (N.D. Cal., filed Sept. 9, 1969), on October 3, 1969.

E.g., Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962), wherein the tenant claimed he was being evicted because of his race (Negro). The court of appeal ordered the trial court to admit proof on the issue because to refuse would constitute state action enforcing racial discrimination. See U.S. CONST. amend. XIV; CAL. CONSTR. art. 1, § 13.

There are two other exceptions: (1) affirmative defenses or counterclaims can be litigated in the unlawful detainer proceeding if possession is voluntarily abandoned subsequent to the commencement of the action. E.g., Knowles v. Robinson, 60 Cal. 2d 620, 625, 387 P.2d 833, 836, 36 Cal. Rptr. 33, 36 (1963); Erbe Corp. v. W. & B. Realty Co., 255 Cal. App. 2d 773, 778, 63 Cal. Rptr. 462, 465 (1967); Heller v. Melliday, 60 Cal. App. 2d 689, 696, 141 P.2d 447, 451 (1943). (2) If no motion to strike the counterclaim is made during the proceeding, it can be decided on appeal. Garfinkle v. Montgomery, 113 Cal. App. 2d 149, 155, 248 P.2d 52, 56 (1952).

There is also some question whether the trial judge specifically denied evidence on all of the various defenses, see note 70 supra, or whether these defenses were even made clear to him, see note 90 supra. Nonetheless, the case remains a valuable resource for many constitutional challenges to California's unlawful detainer procedure.
ing an eviction. This section, however, fails to exempt any of the tenants' belongings from such seizure and storage.

There are at least three possible reasons for this omission: One is that the California Legislature intended to omit such exemptions; another is that the legislature felt the exemptions would be understood to have been included and thus did not mention them; the third is that the legislature failed to consider the problem at all.

The third reason seems implausible when one considers that the 1968 amendments to the Baggage Lien Laws, which contain exemption provisions, were considered at about the same time, and by the same committee that considered the 1968 amendments to section 1174. Assuming, therefore, that this third reason is incorrect, let us examine the results flowing from the first and second reasons.

In a recent decision, the Alameda County Superior Court apparently proceeded on the assumption that the omission was intentional. The court found this omission unconstitutional on the ground that it is an unreasonable classification to allow exemptions in other attachments or executions, but not in the execution of a writ of possession. Consequently, the court ordered the sheriff to take custody of the tenant's belongings and to move them to a public warehouse. By so doing, the sheriff became a "levying officer" within the terms of the Code of Civil Procedure and could lawfully be served with claims of exemption under the aforementioned code sections.

In contrast to the above, a Los Angeles County Superior Court refused to find a legislative intent to eliminate exemptions. The court suggested that the extensive exemption provisions found in the Code of Civil Procedure section 690 and following, and the more

97. CAL. CIV. CODE §§ 1861, 1861a.
98. Assembly Judiciary Committee.
99. A.B. 301, amending CAL. CIV. CODE §§ 1861, 1861a, was sent to committee February 2, 1968. A.B. 387, amending CAL. CODE CIV. PROC. § 1174, and adding CAL. CODE CIV. PROC. § 1034.5, was sent to committee February 8, 1968. 1968 FINAL CALENDAR OF LEGISLATIVE AFFAIRS.
101. Under CAL. CIV. CODE §§ 1861, 1861a; CAL. CODE CIV. PROC. § 690 et seq.
102. An official memorandum of the court's conclusion of law has not been filed. See note 103 & accompanying text infra. That the foregoing is the court's reasoning is an interpolation from a suggested memorandum of decision submitted to the court by the Alameda County Legal Aid Society, which represented the plaintiff in seeking the writ of prohibition. A copy of the Legal Aid Memorandum is on file with The Hastings Law Journal.
103. Alameda Sheriff Interview, supra note 17.
limited provisions in Civil Code sections 1861 and 1861a (Baggage Lien Laws), indicated a legislative concern for the subject. The court also noted that Civil Code section 1861a was amended in the same legislative session as section 1174. Thus, given the legislators' concern and their recent activity in the area, the court would not find a legislative intent to exclude exemptions from unlawful detainer proceedings absent a clear statement to that effect.

The court went on to state that there is no reason to restrict the meaning of the words "levying officer" to a sheriff or marshal. Since the landlord acquires control of the property by virtue of a writ of possession, he "is, in legal contemplation, the 'levier.'" Accordingly, exemptions are possible under section 1174.

Although both of the above decisions permit exemption claims, the Los Angeles decision seems preferable. In contrast to the Alameda court, it did not arrive at its conclusion by invalidating existing law, nor does it necessitate removal of the goods from the premises. While the Los Angeles decision provides a useful interim solution to the problem, it is hoped that legislative clarification is not far off.

C. Costs

Tenants, like landlords, also find the cost of unlawful detainer prohibitive. Not only is there an attorney's fee for defense of the action, and court costs if the tenant loses, but additional attorney's fees are necessary if the tenant chooses to bring a separate damage-counterclaim action. There is also the very real, although somewhat elusive, cost of being dispossessed pending appeal, especially when one considers the limited housing available to the type of persons most often evicted in an unlawful detainer action.

106. See note 99 supra.
108. That is, the landlord has a right under CAL. CODE CIV. PROC. § 1174 to store the tenant's goods on the premises. The Alameda County decision finds this unconstitutional and invalidates it because of the lack of an exemption provision.
109. See text accompanying notes 171-72 infra.
110. For the discussion of landlord's cost complaints see text accompanying notes 4-53, supra.
111. This is similar in amount to the fee charged for bringing the action. Cf. notes 7-8 supra.
112. See notes 10-12 supra.
113. The action must be separate because generally no counterclaims are allowed in unlawful detainer actions. See notes 66-96 supra.
114. A stay of execution pending appeal is discretionary. See note 80 & accompanying text supra.
115. See note 77 & accompanying text supra.
D. Procedural Complaints

Another tenant criticism of California's unlawful detainer procedure is based on procedural considerations. The first problem is with the type of service that the tenant may receive. At least one county requires that the tenant be personally served with the notice to appear.\textsuperscript{116} Since personal service is not specified in the statutes, however, other counties are not so diligent and readily resort to the "nail and mail"\textsuperscript{117} routine. If the process server is dishonest, if the notice blows away or is removed by a third party, or if there is a delay in the mail, there is a real danger that the tenant will not receive notice at all—even of the truncated variety noted below. Because, in addition to a judgment for possession, the landlord can also obtain a money judgment in an unlawful detainer proceeding,\textsuperscript{118} the tenant's constitutional right to notice may well be violated by this lack of personal service.\textsuperscript{119}

If the tenant does receive adequate notice there are still other procedural problems. Section 1170 of the Code of Civil Procedure allows the tenant only three days to answer or demur.\textsuperscript{120} Since the section does not exclude Saturdays or Sundays or holidays,\textsuperscript{121} a summons served on Friday evening effectively reduces the response period to one day.\textsuperscript{122} If the tenant is employed on Monday, he may be precluded from obtaining counsel at all. Assuming, however, that the tenant manages to retain counsel, the three days—let alone one day—are probably not adequate time for the busy practitioner to prepare an effective response.

E. Writ of Possession Prior to Trial

Finally, tenants object to section 1166a of the Code of Civil Procedure, which allows a writ of possession to issue prior to the unlawful detainer action if, by a verified complaint or affidavit, the landlord satisfies the court that

\begin{itemize}
  \item[(116)] Marin Sheriff Interview, supra note 20.
  \item[(117)] San Francisco Sheriff Interview, supra note 19. See generally N. LeBlanc, A HANDBOOK OF LANDLORD-TENANT PROCEEDURES AND LAW, WITH FORMS 8-9 (2d ed. 1969) (New York City procedure) [hereinafter cited as HANDBOOK].
  \item[(118)] See, e.g., cases cited notes 54-55 supra.
  \item[(119)] See CAL. CODE CIV. PROC. §§ 412, 413, 417. But cf. S.B. 503, 900, passed by the California legislature in the last session and signed by the Governor. Cal. Stats. 1969, chs. 1610, 1611, at 521, 536 (Deering's Adv. Leg. Serv. No. 8, 1969), which drop the word "personal" from several California Code of Civil Procedure sections (relating to service of process), apparently opening the door to increased use of other types of service.
  \item[(120)] CAL. CODE CIV. PROC. §§ 1167, 1170.
  \item[(121)] Id.
  \item[(122)] This is because of the difficulties in obtaining counsel on Saturday or Sunday.
\end{itemize}
[the tenant] is insolvent, or has no property that is subject to execution sufficient to satisfy the amount of damages sought to be recovered by the plaintiff, or resides out of the state; or cannot, after due diligence be found within the State, or conceals himself to avoid the service of summons.123

At least two municipal court decisions124 have declared this section to be unconstitutional on due process grounds since there is no provision for a hearing (due process requiring both notice and a hearing).125

The California Legislature has not been unmindful of this objection,126 and in its most recent session, amended section 1166a127 so that it now requires a pretrial motion by the landlord to obtain possession prior to the unlawful detainer action. A hearing is required on the motion, and both parties may present affidavits or oral testimony in support of their positions. The tenant must receive written notice of the hearing informing him that128

he may file affidavits on his behalf with the court and may appear and present testimony on his behalf, and that if he fails to appear the plaintiff will apply to the court for the writ of possession.129

The one shortcoming of this amendment is that it does not describe the scope of the issues to be heard on the pretrial motion; that is, the statute does not specify whether the hearing is confined to the allegations upon which the landlord can obtain the pretrial writ of possession,130 or whether the hearing can range beyond those issues. However, this writer feels that the provision for a hearing in itself answers the procedural due process objections raised in the two previously mentioned131 municipal court decisions that declared section 1166a unconstitutional.

128. This notice must be served according to the procedures set out in section 1011 of the California Code of Civil Procedure.
131. See note 124 & accompanying text supra.
III. An Alternative Procedure

We have just examined several fundamental defects in California's present unlawful detainer procedure. If it is conceded that there is a need for some expeditious means to recover the possession of real property, then two courses are open: Either revise the present system, or substitute a new one. This writer suggests that in light of the extensive revisions necessitated by the aforementioned defects, and in light of the difficulty of equitably accommodating both the landlord and the tenant within the present framework (even if extensively revised), a new system is warranted. Accordingly, an outline proposal for such a new system follows. It is hoped that this new procedure will balance the competing interests of landlord and tenant more fairly, effectively, inexpensively, expeditiously, and perhaps, more amicably than the existing procedure.

A. The Need for a Separate Tribunal

The idea of a separate tribunal to hear and decide landlord-tenant disputes is not unique; such a separate body is presently used in New York City. The advantages of such an arrangement are numerous and varied. First, the problems arising between landlords and tenants are unique; a good indication of this is the provision for unlawful detainer proceedings in the California codes. This suggests that a body dealing exclusively with, or at least specializing in, landlord-tenant problems would be better suited to handle such actions than the general courts, which on an individual basis may encounter such actions only occasionally.

Another advantage to the separate tribunal would be a more rapid calendaring and hearing of the disputes than is now possible. The expertise and familiarity of the tribunal would help to expedite matters brought before the court; also, if there were no other matters competing for its attention, the tribunal could schedule hearings as quickly as the parties were able to proceed.

A separate tribunal, not pressed by other matters, could also devote more time to the issues before it, while continuing to act with dispatch. This would allow both sides of the dispute to be heard in one expeditious action and would foreclose the "delay" argument that is presently offered to justify the exclusion of affirmative defenses and

132. This is generally conceded by even the most vigorous opponents of the present law. See Petitioner's Brief at 18.
134. HANDBOOK, supra note 117, at 5.
135. CAL. CIV. CODE § 792; CAL. CODE CIV. PROC. §§ 1159-79a.
counterclaims. If there were a separate tribunal that could calendar and hear matters more quickly, more time could be devoted to all the issues and still the time lapse between filing and judgment would be no greater (and probably less) than with the present system.

There would also be a collateral benefit to the regular courts by the adoption of a separate tribunal. Under the present system a tenant must bring a separate action to assert any counterclaims or affirmative defenses available to him. If the tenant could present such claims in the original unlawful detainer action, one suit would settle the matter; and thereby eliminate the need for an additional action by the tenant. This, in turn, would help alleviate the problem of over-crowded dockets.

B. The Suggested Form of the Separate Tribunal

It will become apparent that the traditionally styled court is not capable of accomplishing many of the needed reforms in the present unlawful detainer procedure. Thus, a different organization is desirable.

One possible alternative is a small claims type of court. There is, however, at least one serious shortcoming to this approach—lack of counsel. To overcome this due process problem, an absolute right of appeal from the small claims court decision in the form of a trial de novo would be needed. To complete the constitutional safeguard, an automatic stay of execution pending appeal would also be necessary. Yet, both of these elements—trial de novo and automatic stay—would cause delay and expense for both parties and would frustrate the objectives of economy and efficiency.

In any case, it seems undesirable to eliminate representation altogether despite its substantial presence in the cost picture. If under the new system, as proposed, a wide range of defenses and counter-claims is allowed, some type of professional advice would be necessary to ensure both parties the full advantage of their respective rights.

It is submitted that a proceeding similar to that used in workmen's compensation cases would work quite satisfactorily in resolving contro-

136. See generally notes 66-96 & accompanying text supra.
137. See note 75 & accompanying text supra.
138. These reforms include relaxed procedure, independent evidence gathering, no jury, lay practitioners.
141. See notes 142-54 & accompanying text infra.
versies between landlords and tenants. The ensuing discussion notes the features of workmen's compensation procedure that could be used to advantage in landlord-tenant matters, and points out the relevant desirability of these features.142

Workmen's compensation cases are heard by a referee143—the jury being dispensed with.144 This immediately reduces the time and expense levels. More significantly, the referees are not bound by formal procedural rules and can hear almost any evidence that is helpful in arriving at the truth.145 The referee can even gather evidence himself if he deems it necessary.146 This discarding of an often useless formalism works to both parties' advantage; the truth can be sought after without the often excessive concern for relevance and hearsay found in regular court proceedings that confuses, obscures, or even frightens many litigants.

Perhaps the most significant advantage of a workmen's compensation type proceeding is that a person may be represented by one not an attorney. While either party may have an attorney, this is not a requirement; he can be represented by a layman or can represent himself. This would allow the development of "paraprofessionals" who

142. An early discussion of the possibility of applying the techniques of workmen's compensation proceedings to other civil matters can be found in Pillsbury, Applicability of Methods of Trial and Administration Used in Workmen's Compensation Proceedings to Certain Civil Actions, 18 CALIF. L. REV. 223 (1930).

143. It should be kept in mind during the ensuing discussion of workmen's compensation proceedings that whereas individual referees or commissioners may be (and almost always are) appointed by the Workmen's Compensation Appeals Board (formerly the Industrial Accident Commission) to conduct hearings and make decisions, CAL. LABOR CODE §§ 5309, 5310; Bancroft, Some Procedural Aspects of the California Workmen's Compensation Law, 40 CALIF. L. REV. 378, 380 (1952) [hereinafter cited as Bancroft]; CALIFORNIA WORKMEN'S COMPENSATION PRACTICE, § 7.18 at 207 (Cal. Cont. Educ. Bar ed. 1963) [hereinafter cited as CEB—WORKMEN'S COMPENSATION]; see CAL. LABOR CODE § 133, the decisions are technically those of the entire Board, CAL. LABOR CODE § 5315; Bancroft 380 & n.15. For an earlier broad discussion of this situation see the two connected articles, Gallagher, Power of the Industrial Accident Commission to Settle Disputes Arising Under Workmen's Compensation Legislation by the Several Acts of Its Members and Deputies, 27 CALIF. L. REV. 241 (1939) and McGovney, The Industrial Accident Commission's Dilemma and a Proposed Remedy, 27 CALIF. L. REV. 266 (1939). Thus, wherever a statutory power is noted in the paper as belonging to a referee, the statute is usually phrased in terms of the entire board.

144. No specific statutory language refers to eliminating a jury trial in workmen's compensation proceedings. However, the constitutional enabling amendment giving plenary powers to the California Legislature in this area, CAL. CONST. art. 20, § 21, has been held to allow this dispensation. Dominguez v. Pendoia, 46 Cal. App. 220, 188 P. 1025 (1920).

145. CAL. LABOR CODE §§ 5708, 5709; Bancroft, supra note 143, at 388; CEB—WORKMEN'S COMPENSATION, supra note 143, § 1.5, at 5.

146. CAL. LABOR CODE §§ 115, 5701.
could specialize in practice before the landlord-tenant tribunal and
could thus represent individuals more economically and effectively than
an attorney who only occasionally deals with such matters.\textsuperscript{147} Law
students, in clinical programs or otherwise legally active in the com-

Of course, the primary benefit of "paraprofessional" representa-
tion would be to indigent tenants, who could not otherwise afford
counsel. Nevertheless, the advantage would not be closed to land-
lords; it is likely that the small landlord would also resort either to stu-
dent or other "paraprofessional" counseling.

In addition to the above items, the landlord-tenant tribunal would
want to adopt another feature of the workmen's compensation hearings—
simplified pleadings.\textsuperscript{149} In general, this would facilitate the process
for both parties and make "paraprofessional" representation more
feasible. Also, no charge should be made for filings by either party.
This is in accord with the present practice in workmen's compensation
cases.\textsuperscript{150}

It is also important to note that there is no trial de novo from a
referee's decision or a workmen's compensation appeals board de-
cision.\textsuperscript{151} This means, of course, that the informal proceeding leading
to the initial judgment is "real" and not a waste of time or money.\textsuperscript{152} This aspect should be carried over to the landlord-tenant
tribunal.

Finally, it should be mentioned that there are no default judgments
in workmen's compensation cases. The referee, with his evidence-gath-
ering power\textsuperscript{153} to aid him, will make, if necessary, a determination in the

\textsuperscript{147} Note, The Persecution and Intimidation of the Low Income Litigant as
Performed by the Small Claims Court in California, 21 STAN. L. REV. 1657, 1681
(1969) citing NATIONAL INSTITUTE FOR JUSTICE AND LAW ENFORCEMENT, PARAPRO-
FESSIONALS IN LEGAL SERVICES PROGRAMS: A FEASIBILITY STUDY (Report to the Le-
gal Services Program of the United States Office of Economic Opportunity, Dec.
1968).

\textsuperscript{148} A law student is more likely to be thorough and conscientious in representing
such people than a busy attorney who does not consider the fee or experience attrac-
tive.

\textsuperscript{149} CEB—WORKMEN'S COMPENSATION, supra note 143, §§ 1.5, 6.2; 2 B. WITKIN,
SUMMARY OF CALIFORNIA LAW, Workmen's Compensation § 126 et seq.

\textsuperscript{150} CEB—WORKMEN'S COMPENSATION, supra note 143, § 6.2, at 143-44; Ban-
croft, supra note 143, at 386.

\textsuperscript{151} CAL. LABOR CODE § 5952; CEB—WORKMEN'S COMPENSATION, supra note
143, § 12.5, at 362; 2 B. WITKIN, supra note 149, § 138, at 1770.

\textsuperscript{152} Compare this result with that in small claims court, notes 139-40 & accom-
panying text supra.

\textsuperscript{153} Note 146 supra.
absence of either party.\textsuperscript{154} This procedure would be beneficial to the landlord-tenant tribunal, if for no other reason than because it would add another safeguard to both parties' rights should claims of fraud arise. By making a decision, the referee creates a record of the facts alleged and also indicates the basis for his decision; both could prove valuable if a later collateral attack should arise.

There is only one major stumbling block to instituting a workmen's compensation type proceeding. As was true in adopting this procedure in the workmen's compensation field, adoption of it in the landlord-tenant field will require an enabling amendment to the California Constitution.\textsuperscript{155} This is necessary to overcome the due process argument raised by dispensing with the jury in the proceeding. The overall cost and time advantages, however, would seem to outweigh the political difficulties in obtaining ratification of such an amendment.

C. Substantive Changes in Present Unlawful Detainer Procedure

Accompanying the suggested structural changes, there should also be some changes in the more substantive aspects of the unlawful detainer procedure. For example, set-offs, counterclaims, and affirmative defenses should be allowed. Not only would this put the landlord and tenant back upon equal footing,\textsuperscript{156} but it would also effect a certain administrative saving by eliminating the need for a separate suit for damages by the tenant.\textsuperscript{157} Nevertheless, such a provision would not be truly effective unless other substantive changes in California's landlord-tenant law were made.

The tenant should not be allowed to waive his rights under Civil Code sections 1941 and 1942. Together, these sections impose a duty upon the landlord to maintain tenantable premises and create a concomitant right in the tenant to take affirmative action to enforce that duty. But the landlord's duty is rendered nugatory by statutory language\textsuperscript{158} and court decisions upholding waiver by express agreement.\textsuperscript{159} Considering the legislature's concern for tenantable housing, as expressed in these statutes, and the social desirability of tenantable housing, it

\textsuperscript{155} CAL. CONST. art. 20, § 21.
\textsuperscript{156} See notes 66-96 & accompanying text supra.
\textsuperscript{157} See notes 66-96 & accompanying text supra. Of course, by allowing counterclaims, the constitutional challenge that arises by presently disallowing them is met.
\textsuperscript{158} "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable . . . ." CAL. CIV. CODE § 1941 (emphasis added).
\textsuperscript{159} E.g., Arnold v. Krigbaum, 169 Cal. 143, 147, 146 P. 423, 424-25 (1915).
seems inconsistent to allow waiver of the landlord's duty to repair.\textsuperscript{160} In the same vein, retaliatory evictions for reporting uncorrected code violations to the authorities should be prohibited in furtherance of the state policy, expressed in Civil Code sections 1941 and 1942, that dwelling premises should be tenantable. This could be accomplished by providing for a rebuttable presumption of retaliation if an unlawful detainer action follows a reported violation within a specified period of time. This presumption would aid tenants in defending such actions and might encourage irresponsible landlords to assume their rightful responsibility in this area.\textsuperscript{161}

The landlord should be allowed to sue for future damages. This is particularly desirable in long-term lease situations,\textsuperscript{162} where a suit at the end of the term would otherwise be necessary.\textsuperscript{163} Since a strong argument can be made that leases should be treated as contracts under California law,\textsuperscript{164} (although they are generally not, at present)\textsuperscript{165} such a provision for future damages would further this objective and relieve the landlord from the problem of surrender.\textsuperscript{166} In any case, the landlord should still be under a duty to mitigate damages to avoid undue hardship on the dispossessed tenant.\textsuperscript{167}

The time within which an answer or demurrer must be filed should be extended from three days\textsuperscript{168} to at least seven days, excluding Saturdays, Sundays and holidays.\textsuperscript{169} This would allow a defendant

\textsuperscript{160} The tenant's problem is compounded when one considers that almost every California standard form lease contains a covenant waiving the tenant's rights under sections 1941 and 1942. The tenant's problem is also exacerbated by his inability to bargain for a lease without the waiver because of the limited supply of alternative housing. See note 174 & accompanying text infra.

\textsuperscript{161} Legislation embodying these proposals was introduced during the 1969 California legislative session but died in the Senate Judiciary Committee after having passed the Assembly. A.B. 2069, § 3 (1969). The bill received strong landlord opposition. A sponsor of the bill is very pessimistic that any such legislation will be passed by the California legislature in the very near future. Telephone Interview with Assemblyman Willie Brown, Jr., Sept. 12, 1969.

\textsuperscript{162} See notes 57-61 supra.


\textsuperscript{164} See generally Harvey supra note 57; Note, \textit{The California Lease—Contract or Conveyance}, 4 STAN. L. REV. 244 (1952).

\textsuperscript{165} Harvey, supra note 57, at 1151.

\textsuperscript{166} See cases cited notes 59, 61 & accompanying text supra.

\textsuperscript{167} Cf. note 60 supra. In at least two recent California legislative sessions bills have been introduced to accomplish these objectives; Senate Bills 101 (1969) and 252 (1967). While neither bill was passed, some optimism exists that such legislation may be successful during the 1970 session. Discussion at the morning session of the California Law Revision Commission meeting, held in San Francisco, in the Board Room of the State Bar Building, Oct. 3, 1969.

\textsuperscript{168} CAL. CODE CIV. PROC. §§ 1167, 1170.

\textsuperscript{169} Id. See \textit{Interim Hearings on Housing Before the Committee on Governmental Efficiency and Economy} 91 (San Francisco, Dec. 12, 1968).
adequate time to seek counsel and to prepare his case.\textsuperscript{170}

The law should definitely state that the exemption claims of the Code of Civil Procedure section 690 and following apply, and should provide that the person with custody of the tenant's belongings is the "levying officer"\textsuperscript{171} upon whom the claim can be served. Such a definitive statement will clear up the confusion that exists regarding the intent of the present law.\textsuperscript{172}

In addition, the law should provide for or encourage arrangements after judgment wherein the impact of the judgment is apportioned over a period of time. In other words, if the action was for rent due and the tenant had withheld it in the good faith belief that it was not yet due, the landlord should continue the tenant in possession provided he commences paying full rent and a certain portion of the past due rent until fully paid. The San Francisco Housing Authority presently employs such a plan when it obtains a judgment in an unlawful detainer suit. Instead of enforcing the writ of possession, the authority works out an arrangement with the tenant to repay as much of the past due rent as he can afford.\textsuperscript{173} This saves the tenant and the landlord the trauma of eviction yet insures that the landlord will eventually get his money.

Then too, if the landlord does prevail at trial, as a matter of right there should be a stay of execution pending appeal for the tenant. This is particularly important in tight housing markets with rising rents, and the consequent limited availability of reasonable alternative housing.\textsuperscript{174} The appealing tenant should be required, however, to post a bond adequate to cover the disputed rents or the damages sought by the landlord. If the dispute is over the landlord's duty to repair, the tenant should deposit the rent payments in an escrow account in the landlord's name. This will not only indemnify the landlord if he wins, but will provide a fund from which to make the repairs if the tenant prevails.\textsuperscript{175}

Whenever the unlawful detainer action is brought for nonpayment of rent\textsuperscript{176} and the landlord wins, a hardship may nevertheless befall

\begin{footnotes}
\item[170] \textsc{Cal. Code Civ. Proc. §§ 1167, 1170.}
\item[171] \textit{Id.} § 690.26.
\item[172] \textit{See} notes 97-109 & accompanying text \textit{supra.}
\item[173] \textit{See} Sullivan interview, note 20 & accompanying text \textit{supra.}
\item[174] \textit{See} SAN FRANCISCO DEPARTMENT OF CITY PLANNING, ISSUES IN HOUSING—HOUSING REPORT 2, 9-11, 16, 18, 20, 22, 24, 32, 34 (July 1969).
\item[175] \textit{Cf.} \textsc{Cal. Civ. Code} § 1941, 1942. Note that the withheld rent is for the purpose of making needed repairs under the code section and is not a windfall to the tenant. Note also that the present limitation on withholding (one month) is, in many cases, inadequate to cover the work needed. Consequently, the period—and, concomitantly, the dollar amount—for withholding should be extended. Safeguards should be introduced at the same time, however, to insure that the tenant's withholding is in good faith and not excessive.
\item[176] \textsc{Cal. Code Civ. Proc.} § 1161(2).
\end{footnotes}
the landlord if a stay is granted pending the tenant’s appeal, and the landlord consequently fails to receive the monthly rent. This is particularly true in the case of the small landlord who is hard pressed to make the monthly mortgage payments. To provide for this type of situation, it might be desirable to make low-cost rent loans available to such landlords. If the tenant loses his appeal, he would pay, in addition to the rent and or damages, the interest on the loan. If the tenant is successful on appeal, the landlord would return to the lender that portion of the funds not due and any interest thereon.

If the unlawful detainer action was for breach of a covenant, a temporary restraining order against the tenant might be appropriate. This would allow the tenant to remain in possession but still protect the landlord against further damage by the tenant.

In addition to the above changes, there should also be statewide uniformity relative to the enforcement procedure upon the issuance of the writ in possession. For example, if the tenant’s belongings are left on the premises or seized under a lien, the landlord should be allowed to store them on the premises in a safe area separate from the rental unit. This technique has the triple virtue of protecting the tenant’s belongings, avoiding moving costs, and allowing the landlord to re-rent the property without costly delay.

In this same vein, statewide guidelines should be established as to the detail necessary for an adequate inventory. This would eliminate the wide variation in practice and cost now found. The regulation could also specify that the inventory be taken or verified by a keeper—a special deputy hired at a minimal wage. Use of a keeper would avoid much of the high cost resulting from the prohibitive charges of professional movers or inventory takers, and would also provide employment for retired or disabled persons.

Finally, to minimize the necessary capital outlay, enforcement agencies should be encouraged to calculate the amount of the deposit

177. CAL. CODE CIV. PROC. § 1161(3). There are two other bases for the action: holding over after the term has expired, CAL. CODE CIV. PROC. § 1161(1), or subletting, waste and nuisance, CAL. CODE CIV. PROC. § 1161(4).
178. See CAL. CODE CIV. PROC. § 1174; see notes 34-50 supra.
179. CAL. CIV. CODE §§ 1861, 1861a.
180. This writer assumes that most buildings will have an empty garage or basement storeroom available for such services.
181. See note 43 supra.
182. See note 42 & accompanying text supra.
183. A keeper for property under execution is authorized by CAL. Gov’t CODE § 26726. The same provision sets the amount of fees that can be charged for the keeper. Such a keeper is used in Marin County and has had some success in minimizing fees. Marin Sheriff Interview, supra note 20.
184. See note 44 supra.
by the use of a per room charge. This is only logical since a per room deposit relates more closely to the actual costs that will be incurred than does the nondiscriminating flat fee.

**Conclusion**

The foregoing discussion has presented some reasons for revising California's unlawful detainer procedure and has suggested, in broad outline form, the direction those changes should take. The intent was not to be encyclopedic, but rather to stimulate creative thinking in an area of relevant social concern. Landlord and tenant may never become undying friends but that does not mean they cannot deal with one another amicably.

Implementation of the plan suggested by this Note will require many additional hours of careful research and drafting. However, it is hoped that the need for, and the feasibility of, such a new system has been adequately demonstrated.  

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185. On January 5, 1970, a decision was filed in Hutcherson v. Lehtin, Civ. No. 52196 (N.D. Cal. Jan. 5, 1970) (a copy of the decision is on file with *The Hastings Law Journal* pending publication in the *Federal Supplement*), discussed in text accompanying notes 69-96 supra. The three judge court rejected the equal protection and due process arguments raised in the petitioner's brief but abstained from deciding the retaliatory eviction-free speech issue pending a definitive decision by a California court on whether such a defense is admissible in an unlawful detainer proceeding.

In rejecting the equal protection argument the court relied heavily on Telegraph Ave. Corp. v. Raentsch, 205 Cal. 93, 97-98, 269 P. 1109, 1111 (1928). *Telegraph* was intentionally omitted from this Note since its quoted conclusion was unsupported by authority or adequate reason and sidestepped the issues that were raised in the petitioner's brief. For the three judge court to rely on this authority is to compound the original error and does nothing to diminish the force and logic of the petitioner's arguments. In rejecting the due process argument the court relied heavily on its conclusion regarding the equal protection argument—again compounding the error.

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